

# **WISCONSIN LEGISLATIVE COUNCIL STAFF**

## ***RULES CLEARINGHOUSE***

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## **CLEARINGHOUSE RULE 00-135**

### **Comments**

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

### **2. Form, Style and Placement in Administrative Code**

a. SECTION 3 should indicate where subch. I (title) is to go--presumably before s. NR 51.001.

b. This rule repeatedly includes substantive requirements in definitions. Definitions should state only what a term means, as used in the rule; substantive requirements should be placed in separate provisions. [See s. 1.01 (7), Manual.] For example, in s. NR 51.002 (1), the rule is inserting an exception into the definition of “acquisition cost.” The intent of this exception is to say that certain costs will be excluded from allowable acquisition costs in certain circumstances. Instead, the rule should specify in the appropriate substantive provision that those costs must be excluded from the calculation of acquisition costs. Also, in the definition of “baseline document” in s. NR 51.002 (3), the material beginning with the words, “which shall” is substantive. In this case, it appears that the entire definition should be omitted and incorporated into the few places in the rule where the term is used. Other examples of substance in definitions are the second and third sentences of s. NR 51.002 (17), the second sentence of s. NR 51.002 (10) (again, is a definition of “fringe benefit” needed?), the third sentence of s. NR 51.002 (19), the second sentence of s. NR 51.52; the second and third sentences of s. NR 51.903 (3) and the second sentence of s. NR 51.932 (1).

c. Similarly, provisions of definitions (and other provisions) that are merely explanatory or illustrative should be placed in a note following the provision. See, for example, the second sentence of s. NR 51.002 (15), the third sentence of s. NR 51.74 (6) (f) 1. and the fourth

sentence of s. NR 51.903 (3). Conversely, the note that follows s. NR 51.917 (1) makes a requirement of grant applicants and so should be placed in a substantive provision of the rule.

d. The rule unnecessarily rennumbers provisions so as to retain sequential numbering. See, for example, SECTION 5. For a less cumbersome alternative to this practice, see s. 1.03 (7), Manual.

e. Terms should be in the singular when used in a general sense. For example, the definition of “governmental unit” should be “a town, village, city, county or the Kickapoo reserve management board.” Note also the use of “or” instead of “and” in this example.

f. The definition of “middle kettle moraine” is not so much a definition as a general description. If no delineation of this area exists to which the rule can refer, as the definition of “Baraboo hills” does, perhaps the rule should either give a legal description of the area intended or a map of the area. Also, the parentheses should be replaced by commas.

g. The definition of “Baraboo hills” should be revised to simply describe the geographic area known as the Baraboo Hills. The exclusion of land within that area that is within established acquisition boundaries is substance, which should be omitted from the definition. Instead, another provision of subch. X should be created specifying that projects to acquire land within those acquisition boundaries are not eligible for grants under that subchapter. Also, “hills” should not be capitalized.

h. In several provisions, the rule states that the department may establish a certain requirement. In s. NR 51.004 (2), the requirement is a minimum grant amount; in s. NR 51.883 (1) and subsequent sections, the requirement is an application deadline. These are substantive policies that meet the definition of a rule. If the department is going to establish the requirements, it should specifically do so in the rule.

i. SECTION 11 incorrectly rennumbers several subchapters in one SECTION. Each subchapter should be renumbered in a separate SECTION, in the order in which they occur in the rule.

j. In s. NR 51.02, the colon at the beginning of the list should not be stricken and the new material “s. 23.0917 (4m), Baraboo hills;” should be underscored.

k. In s. NR 51.03 (19), the phrase “is responsible for seeking” should be replaced by the phrase “shall seek a.”

l. To the extent possible, the rule should be written in the active voice. Required actions should be in the form “X shall do Y.” Too often, the rule states that something must be done but does not say who must do it. For example, s. NR 51.06 (1) should read: “The department shall base its evaluation of acquisition projects on . . . .” In s. NR 51.09 (3), about half the paragraphs are written in the active voice and half in the passive voice. Paragraph (b) should read: “The sponsor may request interim payments”; par. (c) should read: “The sponsor shall . . . .” (instead of “should”); par. (e) should read: “The department may withhold final payment . . . .”; and par. (f) should read: “. . . the department may require the sponsor to

submit . . .” Section NR 51.914 (2) should state who must submit the specified plans or documentation. The entire rule should be reviewed for the use of the active voice. (The passive voice is acceptable when describing certain requirements, such as required attributes of a project. For example, “An eligible project shall be of statewide significance.”)

m. Material that follows an introductory clause should follow both grammatically and conceptually from the introduction, as a continuation of the sentence started in the introduction. Section NR 51.06 (3) (c) and (d) should be rewritten either to follow from s. NR 51.06 (3) (intro.) or as separate subsections of s. NR 51.06. See also s. NR 51.09 (1) (d) and (e). Section NR 51.907 (2) (a) 4. can be conformed to the grammatical structure of the introduction by inserting a period after “project” and making the remaining material into a separate sentence. Also, an introductory clause should end with a phrase such as, “all of the following” or “any of the following.” This is missing, for example, in s. NR 51.46 (3) (intro.). Also, s. NR 51.74 (2) (intro.) should be amended by adding, at the end, “meets one or more of the following,” and each of the following paragraphs should end with a period.

n. When a provision is both renumbered and amended, both treatments should be accomplished in a single SECTION placed in the rule in the order of the provision before it is renumbered. See, for example, the treatment of s. NR 51.06, which is renumbered s. NR 51.08 in one SECTION but amended in a later SECTION.

o. The treatment clause of SECTION 28 should read: “NR 51.25 is renumbered NR 51.24 and amended to read:” since the entire text of what is renumbered is also amended.

p. The introduction to definitions in subchapters should not refer to the other definitions that apply to the entire chapter, but should state, simply: “In this subchapter, . . .” This is done correctly in some subchapters of ch. NR 51 and incorrectly in others.

q. The rule amends s. NR 51.46 (10) from a perfectly clear active voice construction to a vague passive voice construction. Whose failure to fulfill terms of the contract may prompt the department to seek reimbursement? If the intent is to expand this beyond failures of the sponsor, the rule should explicitly identify the other parties intended; otherwise, the structure should not be changed. Compare this provision to s. NR 51.74 (6) (f) 2.

r. The rule appears to be inconsistent in the amount of process specified in the various subchapters. Some subchapters include specific provisions regarding how applications for grants are made and reviewed, who may apply, what costs or activities are eligible, the amount of grants and matching requirements and other requirements. Other subchapters lack such provisions. It appears that subch. XI provides this information for applications by governmental units for grants under a variety of subchapters, but there is no similar set of provisions for nongovernmental project sponsors.

s. Section NR 51.62 (intro.) should be repealed and recreated to read: “In this subchapter:” and the phrase: “For the purposes of this subchapter,” should *not* be inserted in s. NR 51.62 (1).

t. If used, titles should be used consistently throughout a given section, subsection or paragraph. For example, since s. NR 51.74 (6) (f) is the only paragraph in s. NR 51.74 (6) that is given a title, either that title should be omitted or the other paragraphs in that subsection should be given titles. The same comment applies to s. NR 51.907 (1) (c). In contrast, s. NR 51.907 (2) (a) is the only paragraph in s. NR 51.907 (2) that does not have a title; a title should be provided for this paragraph.

u. SECTION 65 attempts to repeal, recreate and renumber a subchapter in one SECTION. Instead, two SECTIONS should be used, the first of which repeals subch. VI and the second of which creates subch. IX.

v. Subchapter IX of ch. NR 51 should include a definition of “friends group,” which should simply cross-reference the definition in s. 23.098 (1) (b), Stats.

w. Section NR 51.83 should be rewritten along the lines of the following:

**NR 51.83 Eligible projects.** The department may award a grant for a project that meets all of the following requirements:

(1) The project is for nature-based outdoor recreation, as defined . . . (Note lack of quotes.)

(2) The project addresses unmet needs . . .

(3) Except for a project described in s. NR 51.84 (2) (g), the project is identified . . .

(4) Except for a project described in s. NR 51.84 (2) (g), the project makes or installs . . . .

x. In s. NR 51.85 (8), the word “should” should be replaced by the word “shall.”

y. In s. NR 51.885 (2), the slashed alternative should be replaced by the word “or.” See also s. NR 51.84 (2) (c).

z. In s. NR 51.904 (3), the introductory material should be renumbered as par. (a) and the following paragraphs renumbered accordingly. In sub. (5), the phrase “shall be responsible for operation and maintenance of” should be replaced by the phrase “shall operate and maintain.”

aa. Section NR 51.904 (8) (title) could be recast as an introduction, stating: “The following requirements apply to acquisition projects:” The same applies to the following subsection. Also, the first sentence of s. NR 51.904 (9) (a) should be omitted and be placed in a note.

ab. In s. NR 51.904 (8) (j), the phrase “is responsible for seeking” should be replaced by the phrase “shall seek a.”

ac. In ss. NR 51.915 and 51.916, specific reference should be made to “development projects” and “land acquisition projects” in the text of the rule. The titles to rule provisions are not considered rule text.

ad. In s. NR 51.926, the first sentence should be renumbered as sub. (1) and subs. (1) to (3) should be renumbered accordingly as should the paragraphs listed under the subsections. Subsection (4) then should be renumbered as sub. (2). It also appears that, in the introduction, the word “priorities” should be replaced by the word “considerations.”

ae. The third sentence of s. NR 51.994 (6) should begin: “A final accounting . . .”, as it reads in the current rule.

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

a. To the extent that new forms are required by Clearinghouse Rule 00-135, the requirements of s. 227.14 (3), Stats., should be met.

b. Citations to statutory provisions in ch. 66, Stats., should be reviewed in light of the recodification of that chapter by 1999 Wisconsin Act 150.

c. The first cross-reference in s. NR 51.03 (1) (intro) should be to s. 23.0917 (4m), Stats.

d. In s. NR 51.03 (15), it would be helpful to the reader to cross-reference the subchapter of ch. NR 51 that relates to the land acquisition program referred to in the first sentence. Similarly, it would be helpful to tie the provisions of subch. XI, as specified in s. NR 51.902, to the other subchapters of ch. NR 51 that address the programs cross-referenced at the end of s. NR 51.902.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. The cataloging of public lands under s. NR 1.445 (3) (b) omits at least two significant categories of public lands, those being landholdings of the University of Wisconsin System and transportation rights-of-way.

b. In s. NR 51.002 (10), the comma after the word “retirement” should be replaced by the word “and.”

c. In s. NR 51.002 (26), a reference is made to five decentralized administrative offices of the department. However, the note lists six offices.

d. In s. NR 51.002 (27), the comma after the word “board” should be deleted.

e. In s. NR 51.004 (8), the word “or” should be inserted before the second occurrence of the word “to.”

f. In s. NR 51.03 (15), it would be more conventional phrasing to refer to the “subprogram **under** s. 23.0917 (3)” rather than “in.”

g. In s. NR 51.03 (20), the word “their” should be replaced by the word “its.”

h. The last sentence of s. NR 51.04 (1) (a) would be clearer if the phrase “of the application” were inserted after “evaluation.”

i. Throughout the rule, purposes for which grants may be awarded are stated as actions. This is not the case, however, in s. NR 51.05 (1). For example: “For the middle kettle moraine,” in s. NR 51.05 (1) (c), is not a purpose; presumably, this provision should read something like: “For land acquisition in the middle kettle moraine.” The other paragraphs of that subsection should be reviewed for similar problems.

j. Section NR 51.05 (1) (g) should read either, “For fish hatcheries involving cooperative work with the state,” or “For fish farms, as defined in s. 95.60 (1) (a), Stats., involving cooperative work with the state.” There is no need for both terms.

k. In s. NR 51.09 (intro.), should the word “may” in the second sentence be replaced by the word “shall”? Also, in the last clause, the word “may” should be deleted.

l. Section NR 51.32 should refer to “Lake Michigan or Superior” rather than “Lakes Michigan and Superior,” since no bluffs adjoin both lakes.

m. In s. NR 51.46 (1), the phrase “shall be for” should be replaced by the phrase “shall be in an amount.”

n. It appears that s. NR 51.53 (6) should end with the phrase, “the percent of the lake’s shoreline or watershed captured by the acquisition.”

o. The term “force account” is used in the rule as an adjective but is not defined as such. The definition should say that force account “means with the resources of the sponsor . . . .” However, it appears that the term is used only once, in which case it would be more appropriate to replace the term in the text of the rule with more descriptive language that does not require definition.

p. It appears that ss. NR 51.885 and 51.886 should be combined.

q. In s. NR 51.904 (8) (k), the word “their” should be replaced by the word “its.” In sub. (9), the word “and” should be inserted before the phrase “historical and environmental considerations.”

r. Section NR 51.913 states that funds shall be apportioned on a “department region allocation system,” but then specifies a formula that relates to counties rather than department regions. It appears that the reference to a “department region allocation system” should be omitted. In that case, could the definition of “region” in s. NR 51.002 (26) be omitted, as well?

s. In s. NR 51.914 (3), it appears that the word “may” should be replaced by the word “are.”

t. In s. NR 51.915 (intro.), the word “development” should be inserted before “projects.” In the following section, the words “land acquisition” should be inserted before “projects.”

u. The use of terms referring to community gardening in subch. XIII is inconsistent. The defined term is “noncommercial community gardening.” Terms used in the subchapter include “noncommercial gardening,” “community gardening” and “garden” (as in “garden project priorities”). A single term should be selected (“community gardening” is suggested), defined and used consistently in the subchapter. Also, the definition of the term is incomplete, since it does not explain the community aspect of the concept.

v. The paragraph break before s. NR 51.931 is missing.

w. Sections NR 51.942 (3) and (4) should be combined into a single definition, as follows: “‘Development rights’ means the rights of a landowner to make improvements, including the construction or placement of buildings, structures, facilities or utilities, to the property to the greatest extent allowed under state and local laws.”